

**United States Department of Labor
Employees' Compensation Appeals Board**

B.B., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Philadelphia, PA, Employer**

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**Docket No. 08-1338
Issued: November 4, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 2, 2008 appellant timely appealed the March 5, 2008 merit decision of the Office of Workers' Compensation Programs, which denied her traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant sustained an injury in the performance of duty on January 23, 2008.

FACTUAL HISTORY

Appellant, a 60-year-old tax examining technician, fell in a parking lot while on her way to work on the morning of January 23, 2008. She reportedly slipped on a patch of black ice as she walked from her car to the building lobby. Appellant sustained a closed fracture of the left proximal humerus. The employing establishment challenged appellant's claim on the basis that her injury occurred at 4:45 a.m., which was 1 hour and 15 minutes prior to the scheduled start of

her workday. According to the employing establishment, appellant arrived early due to inclement weather. She later explained that, due to news broadcasts of weather and road conditions, she left home early to arrive at campus on time. Appellant noted that her morning commute was before dawn and she tried to be extremely cautious when road conditions were hazardous. She stated that she parked her car upon arrival at campus and slipped on an ice patch while crossing the parking lot.

By decision dated March 5, 2008, the Office denied appellant's traumatic injury claim. It found that appellant was not in the performance of duty when she fell at 4:45 a.m. on January 23, 2008.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained "while in the performance of his duty."¹ In order to be covered, an injury must occur at a time when the employee may reasonably be said to be engaged in his master's business, at a place when he may reasonably be expected to be in connection with his employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.² For an employee with fixed hours and a fixed workplace, an injury that occurs on the employing establishment premises when the employee is going to or from work, before or after working hours or at lunch time, is compensable.³ However, that same employee with fixed hours and a fixed workplace would generally not be covered when an injury occurs off the employing establishment premises while traveling to or from work.⁴ The reason for the distinction is that the latter injury is merely a consequence of the ordinary, nonemployment hazards of the journey itself, which are shared by all travelers.⁵

The employing establishment premises may include all the property owned by the employer.⁶ But even though an employer does not have ownership and control of the place where an injury occurred, the locale may nevertheless be considered part of the premises.⁷ For example, a parking lot used by employees may be considered a part of the employing establishment premises when the employer contracted for the exclusive use of the facility or where specific parking spaces were assigned by the employer.⁸ Other factors to be considered include whether the employer monitored the parking facility to prevent unauthorized use,

¹ 5 U.S.C. § 8102(a) (2000).

² *Roma A. Mortenson-Kindschi*, 57 ECAB 418, 423-24 (2006).

³ *Id.*; *Denise A. Curry*, 51 ECAB 158, 160 (1999); *Narbik A. Karamian*, 40 ECAB 617, 618-19 (1989).

⁴ *Idalaine L. Hollins-Williamson*, 55 ECAB 655, 658 (2004).

⁵ *Id.*

⁶ *Denise A. Curry*, *supra* note 3.

⁷ *Id.*

⁸ *Roma A. Mortenson-Kindschi*, *supra* note 2; *Diane Bensmiller*, 48 ECAB 675, 678 (1997).

whether the employer provided parking at no cost to the employee, whether the general public had access to the parking facility and whether there was alternate parking available for the employee.⁹ An employee's mere use of an offsite parking lot, by itself, is not sufficient to demonstrate that the parking lot is part of the employer's premises.¹⁰

ANALYSIS

Assuming *arguendo* that the parking lot where appellant fell was part of the employing establishment premises, her January 23, 2008 injury is nonetheless excluded from coverage under the Act. Appellant was not in the performance of duty when she fell in the parking lot at 4:45 a.m. She had arrived at work more than an hour prior to her regularly scheduled start time of 6:00 a.m. While coverage may be extended to on premise injuries that occur when an employee is going to or from work, before or after working hours, the timing of the injury must be within a reasonable interval before or after the shift and the employee must be engaged in preparatory or incidental acts.¹¹ Appellant's arrival 1 hour and 15 minutes prior to her scheduled tour of duty is not considered to be within a reasonable interval of her shift.¹² Moreover, at the time of her injury appellant was not engaged in any preparatory or incidental acts. The Board, therefore, finds that appellant was not in the performance of duty when she fell on the morning of January 23, 2008.

CONCLUSION

Appellant was not in the performance of duty at the time of her January 23, 2008 injury.

⁹ *Diane Bensmiller*, *supra* note 8.

¹⁰ *Id.*

¹¹ *Howard M. Faverman*, 57 ECAB 151, 155 (2005) (an employee's arrival 55 minutes prior to his tour of duty was not considered to be within a reasonable interval).

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board